

Recent Eminent Domain Developments

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Article I, § 11 of the Virginia Constitution:

"The General Assembly shall not pass any . . . law whereby private property shall be taken or damaged for public uses, without just compensation, the term 'public uses' to be defined by the General Assembly."

I. RECODIFICATION OF TITLE 25

A. Legislation recodifying former Title 25 was enacted by the 2003 Session

- Chapter 1: General Provisions
- Chapter 2: Condemnation Procedures
- Chapter 3: Transferring Defeasible Title by Certificate
- Chapter 4: Relocation Assistance and Real Property Acquisition Policies

B. Other Statutory Provisions

II. SJR 271/ HJR 491 JOINT SUBCOMMITTEE (1999)

A. Background

Joint subcommittee "to study the current means and adequacy of compensation to Virginia citizens whose properties are taken through the exercise of eminent domain."

- the methods by which such eminent domain is exercised
- the means by which compensation is provided or obtained

B. Major Issues Addressed in First Year

1. Litigation Expenses

- Federal Equal Access to Justice Act
- Other States

14 states: Condemnor must pay all or some portion of the condemnee's litigation expenses when the condemnee prevails in a dispute over the amount of just compensation. Often the margin between the award and the final offer must exceed a certain percentage of the final offer.

8 states: Courts have discretion to require the condemnor to pay the condemnee's litigation expenses if the condemnee prevails in a dispute over the amount of compensation.

5 states: Courts have discretion to require payment of some of the condemnee's litigation expenses, other than attorneys' fees.

23 states: Condemnors are required to pay a condemnee's expenses under specific circumstances, including (i) bad faith by the condemnor, (ii) unjustified abandonment of the condemnation proceeding, (iii) a finding that the condemnor lacked authority to condemn the property, (iv) the condemnee prevails in an inverse condemnation action, or (v) the condemnor fails to pay a condemnation award within a specified period.

2. Business Losses

General rule: Owner of a business is not constitutionally entitled to compensation for its loss of profits or decrease in the business' value attributable to a condemnation. Several theories have been advanced for this approach.

- too uncertain and speculative to be allowed
- owner is entitled only to the value of the property taken and damages to the remainder, if any
- condemnor is not acquiring the displaced business
- lost profits and business goodwill are viewed as personal to the owner of the property, and not to the property itself.

Several states provide some compensation for business losses.

3. Condemnation of Outdoor Advertising Signs

- "Undivided fee" rule
- September 2001 Lamar decision: Advertiser/tenant could introduce its own valuation testimony regarding the fair market value of the land and improvements based on the income that would be generated by the billboard if belonged to the landowners, on grounds that it is a measure of the billboard structure rather than of a business conducted on the condemned property.

4. Commissioner System

Complaints with selection of panel of commissioners:

- Selection of interested persons
- Random decisions in getting from panel of 12 to 5

5. Condemnations by Virginia's Electric Utilities

- Certificate of convenience and necessity required unless an ordinary extensions or improvements in the usual course of business or constructed outside the company's authorized service area

6. Fear of Transmission Lines as an Element Of Damages

Courts in other states have generally adopted one of three approaches

- Minority view: fear can never be an element of damages
- Intermediate view: award can reflect that fear depresses property values, if the fear is reasonable
- Majority view: Reasonableness of the fear is irrelevant; award is permissible if fear depresses a property's value.

Virginia's position on whether fear can be an element of damages is not clear.

- Commissioners may take into consideration the effect of the fear of the line breaking down and injuring persons and property if the liability to such injury depreciated the market value of the property.
- The effect on the market value of the remaining land attributable to fears of prospective purchasers of electric transmission is a speculative matter.

7. Compensation for Devaluation of Adjacent Property

- Decline in the value of property alone does not constitute "damage" giving rise to a right to compensation.
- If a portion of a single parcel is taken, then the owner must be compensated for the decline in the fair market value of the residue of the parcel, net of any increase in value resulting from the construction of the improvements.
 - Offset by peculiar benefits to residue (if determined by Commissioners)
 - Offset by general enhancement in value to residue (if determined by jury)
- Owner of property near the taken property would not be compensated for loss in the value of his property, unless:
 - nuisance or other injury that would be actionable at common law, or
 - physical injury or disturbance of a property right and the injury suffered by the landowner is substantial and special.

8. Virginia Department of Transportation Condemnations

Reasons for use of eminent domain power:

- Owner's unreasonable expectations, or
- Title defect precludes negotiating a transfer

On average, court fixes compensation in fewer than 100 of 2,500 takings annually

VDOT expenditures:

- \$2.5 million annually on appraisals
- \$2 million annually on outside attorneys' fees and costs
- Rights of way acquisition was 16 to 24 percent of construction expenditures
- 1999: \$178.6 million to acquire rights of way

C. First Year Recommendations

1. Revise the Commissioner System -- SB 453
 - Replace commissioner system with a jury system
 - Compromise: Give the owner the option of using either commissioners or a jury
2. Provide Copy of Condemnor's Appraisal -- SB 453
 - Require condemnors to provide a copy of any appraisal that the condemnor is required to prepare as the basis of their required offer
 - Passed
3. Increase the Survey Expense Reimbursement Limit -- SB 453
 - Increase the maximum reimbursement for condemnee's survey expense from \$100 to \$1,000
 - Passed
4. Require Title Search Before Making Offer or Filing Certificate -- SB 453
 - Purpose was to avoid delays in payments to condemnees
 - Passed
5. Require VDOT to Provide Copy of Title Report -- SB 453
 - Require VDOT to provide to property owners a copy of any report of status of title prepared in connection with its acquisition of property
 - Passed
6. Require Use of Use Licensed Real Estate Appraisers -- SB 453
 - VDOT should be required to use certified general real estate appraisers in conducting its valuations for property acquisitions
 - As passed, requires VDOT to use licensed appraisers
7. Allow Tenants with One-Year Lease Terms to Intervene -- SB 453
 - Existing law limited intervention unless lease term longer than 12 months
 - Recommended that tenants with a lease term of 12 months permitted to intervene
 - Passed
8. Expand the Uniform Act's Scope to All Condemnors -- SB 63
 - Existing law: "State agencies" using federal or state financial assistance
 - Recommended that Uniform Act apply to all condemnations that displace people
 - As passed:
 - Exemption from requirement that appraisal be obtained if value of the property is less than \$10,000, based on assessment records or other objective evidence
 - Exemption for grandfathered projects

9. Increase/Remove the Uniform Act's Cap on Relocation Expenses -- SB 63
- Existing law:
 - \$10,000 cap on payments for business relocation expenses
 - \$20,000 cap on payments to displaced that do not relocate
 - Proposal:
 - Eliminate the cap on business relocation expense reimbursements
 - Increase the cap on business displacement payments to \$50,000
 - As passed:
 - Increase the cap on business relocation payments to \$25,000
 - Adopt recommended increase in business displacement payments
10. Prohibit Condemnations to Control Access Near Interstates -- SB 110
- Proposal: Prohibit VDOT from condemning existing businesses to control or limit access to commercial establishments located within 300 feet of the exit point of the interstate system
 - Passed, with exceptions:
 - Condemnations necessary to meet minimum federal requirements in order to be eligible to receive federal funds for interstate highway construction
 - Contingent on VDOT not receiving notice from the federal government that the act will reduce or jeopardize federal funding of interstate highway construction
11. Acquisitions by Housing Authorities Within 36 Months -- HB 1145
- Require housing authorities to acquire real property that it has identified for redevelopment within 36 months after announcement of the redevelopment plan
 - If do not acquire the property, must reimburse owner's reasonable expenses
 - Carried over
12. Responsibility for Highway Condemnations Transferred to DGS -- SJR 38
- Concern: VDOT has an incentive to limit payments to landowners
 - Proposal: Money committees should examine the feasibility of making the Department of General Services responsible for conducting acquisitions and having the cost of land acquisitions paid for from the general fund rather than from revenues currently dedicated to highway construction purposes.
 - Rolled into SJR 170, which requested JLARC to study issues pertaining to VDOT's financing of highway maintenance and construction
13. Payment of Condemnee's Litigation Expenses -- SB 111
- Proposal: Authorize trial court, in its discretion, to require the condemnor to pay the condemnee's litigation expenses if the compensation awarded exceeds the condemnor's highest offer by 15 percent or more
 - 6-3 vote to delay a decision on this issue until the study's second year
 - SB 111 was passed by indefinitely in Senate Courts

14. Payment of Cost of Condemnee's Appraisal
 - Proposal: Condemnors be required to pay for the reasonable cost of a licensed appraisal conducted for the condemnee in all takings, regardless of whether the condemnation results in litigation
 - Not endorsed

15. Calculating the Value of Condemned Billboard Signs -- SB 452 and HB 1123
 - Proposal: Compensation due to outdoor advertising firms when property on which their signs are located is condemned should be determined by comparable sales or other valuation approaches
 - Not endorsed, but parties were asked to work on compromise language to ensure that the tenants who owned billboards would have the right to present evidence in condemnation proceedings
 - As passed, legislation permits owner of the improvement to present evidence of the fair market value of such improvement in a condemnation valuation proceeding; if the owner of the improvement is not the owner of the land, then the improvement owner shall not be allowed to proffer any evidence of value that the owner of the land would not be permitted to proffer if it owned the improvement

16. Continue the Study for a Second Year -- SJR 37
 - Unresolved issues included
 - payment of condemnee's litigation expenses and
 - compensation for lost profits of a business

III. SJR 37 JOINT SUBCOMMITTEE (2000)

A. Primary Areas of Focus

- Payment of condemnees' litigation expenses
- Compensating the condemnee for the cost of an independent appraisal
- Allowing a city or town to condemn property outside of its boundaries only if the property is located in a contiguous locality
- Alternative dispute resolution options (mediation and arbitration)

B. Legislation Introduced in 2001 Session

1. Notice of Gas Pipeline Projects -- HB 2268
 - Conforms several notice and public hearing requirements for a gas pipeline to those for electric transmission lines
 - Passed

2. Condemnations by Localities Outside Boundaries -- HB 1825
 - Similar to HB 85 (2000 Session)
 - Prohibits localities from condemning property outside their boundaries unless authorized by general law or special act

- Allows a locality to condemn property outside its boundaries for public utility facilities and transportation systems
 - Passed
3. Exemption from Appraisal Requirement -- SB 1172
- Exempts state agencies from the requirement to conduct an appraisal of property valued at less than \$10,000
 - 2000 Session had created an exemption for condemnors other than state agencies
 - Passed
4. Payment of Condemnee's Litigation Expenses -- SB 1171
- Proposal: Authorize trial court, in its discretion, to require the condemnor to pay the condemnee's litigation expenses if the compensation awarded exceeds the condemnor's highest offer by 15 percent or more
 - Court may consider
 - the extent that the condemnee engaged in conduct that unduly and unreasonably protracted the final resolution of the action
 - whether the position of the condemnor was substantially justified, and
 - whether special circumstances make the award unjust
 - In determining the amount of such fees to be awarded, the court is to consider the benefit provided to the condemnee by any of the professional or expert witnesses for whom the litigation expenses were incurred
 - PBI'd in Senate Courts on 9-6 vote
5. Payment of Cost of Condemnee's Appraisal -- SB 1173
- Proposal: Condemnors be required to pay for the reasonable cost of a licensed appraisal conducted for the condemnee in all takings, regardless of whether the condemnation results in litigation
 - PBI'd in Senate Courts on 13-1 vote
6. Construction of Electric Transmission Lines -- Senate Bill 1174
- Requires public service constructing a 765-kV overhead electric line to offer to purchase any dwelling house that resides within 200 feet of the right-of-way for such 765-kV line
 - PBI'd in Senate Courts on 13-1 vote
7. Mandatory Mediation -- SB 1175
- Requires court, if requested by one parties, to refer the petitioner and other parties to a dispute resolution evaluation session
 - PBI'd in Senate Courts on 8-5-2 vote

IV. STUDY OF EMINENT DOMAIN POWERS OF PUBLIC SERVICE COMPANIES

A. HJR 173 (1998) (failed -- Speaker asked CIB Committee to study the issues):

- Joint subcommittee to examine the use of eminent domain powers by public service companies and determine
 - whether public policy still requires that public service companies be allowed to continue using the power of eminent domain to the same extent permitted in the past;
 - whether suitable alternatives, such as increasing the use of existing poles and facilities, may exist; and
 - the feasibility of placing authority at the appropriate level of government to offer better protection to the affected landowners from unnecessary or ill-advised condemnations.

B. HB 1881 and SB 899 (1999) Clarified the petition and public hearing requirements applicable to condemnations by public service corporations and electric authorities.

- Public service corporations that have not been (i) allotted territories for public utility service by the SCC or (ii) issued certificates to provide public utility service, may not condemn property through until obtaining the requisite certificates of public convenience and necessity required for the facilities

V. RECENT CASES

Ottofaro v. Hampton, 265 Va. 26 (2003): Virginia Supreme Court held that the taking of property in part to build a public road, with the possibility that the 82 % constituting the residue will be transferred to the Industrial Development Authority and leased to a private developer, is for a public use. The court held that there was no evidence that the residue will be conveyed to a private entity. The court stated the following well-established principles:

- public use implies a possession, occupation, and enjoyment of the land by the public at large, or by public agencies;
- a due protection to the rights of private property will preclude the government from seizing it from the hands of the owner, and turning it over to another on vague grounds of public benefit to spring from the more profitable use to which the latter may devote it; and
- to be public, a use must be one in which the terms and manner of its enjoyment are within the control of the governing body, and the public interest must dominate any private gain.

Lamar v. Commonwealth Transportation Commissioner, 262 Va. 375 (2001): The court reaffirmed its 1991 holding that, though billboard structures are real property, a tenant who owns the billboard sign does not have a separate condemnable interest entitling it to a separate condemnation proceeding. The court held that the sign company's appraiser could not testify as to the billboard's future business income, but could introduce its own valuation testimony regarding the fair market value of the land and improvements based on the income that would be generated by the billboard if belonged to the landowners, on grounds that it is a measure of the billboard structure rather than of a business conducted on the condemned property.

VI. 2004 LEGISLATION

Passed:

House Bill 754 (Del. May): Authorizes any Virginia limited liability company that is issued a certificate by the SCC for telecommunications services to acquire property by the exercise of eminent domain. Such powers are currently granted to public service corporations. However, any limited liability company that was certificated to provide telecommunications service prior to July 1, 2004, (i) will not have the power of eminent domain until the Commission specifically authorizes it to exercise such power, and (ii) will not be authorized to exercise the power of eminent domain with respect to any real property that is the subject of any action for trespass unless the Commission finds that the proceeding has been settled or otherwise dismissed. The bill does not affect the right of any property owner to pursue actions for damages to persons or property that occurred prior to July 1, 2004.

House Bill 834 (Del. Drake): Provides that the Commonwealth Transportation Commissioner is not permitted to force relocation on improved owner-occupied property until the owner is permitted to withdraw the funds represented by the certificate filed with the Court. However, if the owner refuses to withdraw the funds represented by the certificate filed with the Court or if the Commissioner reasonably believes that the owner does not possess clear title to the property being taken, that ownership of the property is disputed, or that certain owners cannot be located, the Commissioner may petition the Court to establish that the owner does not possess clear title, that the ownership of the property is in dispute, that certain owners can not be located, or that the owner has refused to withdraw the funds represented by the Certificate filed with the Court, and request that the Commissioner be given authority to force relocation.

House Bill 835 (Del. Drake): Reduces from one year to 180 days the time by which, if the Commonwealth Transportation Commissioner (CTC) has taken possession of property without instituting condemnation proceedings, commissioners or a jury shall be appointed to ascertain the amount of compensation to be paid for the property taken and damages done, if any.

Carried Over:

Senate Bill 301 (Sen. O'Brien): Requires that property be put to the public use for which it was condemned within 10 years and that if it is not, it will be offered for sale to the person who owned it at the time of condemnation before being publicly auctioned. There are exceptions for property acquired by the Commonwealth Transportation Commissioner and for situations where the failure to put the property to public use is for reasons beyond the reasonable control of the condemnor.

House Bill 826 (Del. Drake): Strengthens the "Landowner's Bill of Rights"

Failed:

House Bill 822 (Del. Drake): Defines, for the purposes of housing authority law, "public use" to mean the possession, occupation, and enjoyment of land by the public at large, or by public agencies. The bill provides that to ensure the protection of the rights of private property owners, the government shall not seize land from a property owner and turn it over to another on vague grounds of public benefit to spring from the more profitable use to which the latter may devote it. The benefiting of a private entity, whether by acquisition, purchase, or leaseback shall not constitute a public use.

House Bill 832 (Del. Drake): Provides that a court shall reopen a condemnation case, in which a party was served by publication but did not appear before the date of judgment against him, only to allow the owner to contest the amount of just compensation. The bill makes this provision applicable to redevelopment and housing authorities. A substitute required that property be posted with signs to advise the public that it is the subject of a condemnation proceeding.